IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTIION

Writ Petition No. 7723 of 2007

Rajaram Awuba Nangare ..Petitioner

vs.

Sitaram Awuba Nangare & ors. ..Respondents

Shri A.M.Kulkarni for petitioner.

CORAM: S.C.DHARMADHIKARI J.
27th NOVEMBER, 2007

P.C.

1. Heard Shri Kulkarni appearing for the petitioner/original applicant whose application seeking condonation of delay in filing the appeal was rejected.

2. Civil Misc.Application No.31 of 2007 was filed on 12th January, 2007. It was registered on 22nd January, 2007 and decided on 25th June, 2007 by the impugned order. Enough opportunity was given to the petitioner/original appellant to point out sufficient cause for not approaching the lower Appellate Court for 6 years, 10 months and 26 days.

3. Reg.Civil Suit No.314 of 1995 was filed by respondent no.1 before me against the present

petitioner and another seeking partition and separate possession. That suit was decreed on 18th January, 2000 in the following terms.

> "1. The suit is hereby decreed with costs.
>
> 2. It is hereby declared that the plaintiff is entitled to his 1/3rd share in the suit lands Gat No.2164, admeasuring 57 Are and Gat No.2486 admeasuring 1 H 18 Are of village Kawalapur and in the house property bearing C.T.S.No.1632, 1633, 1634 admeasuring 168.7 sq.meters.
>
> 3. The partition of the suit lands shall be made by the Collector of Sangli or any other gazetted subordinate of him deputed by him in this behalf in accordance with the law for the time being in force relating to partition or separate possession of shares under sec.54 of C.P.C. The decree be sent for partition of suit lands to Collector, Sangli.

4. The partition of suit house bearing C.T.S.No.1632, 1633, 1634 shall be made by the appointment of Court Commissioner.

5. The plaintiff is entitled to file separate application for future mesne profits of suit lands from the date of filing of the suit.

6. Preliminary decree be drawn up accordingly."

4. The lower Appellate Court has found that the cause which has been shown lacks bonafide. The lower Appellate Court has observed that all material facts from the Court have been suppressed in as much as the original plaintiff pointed out that when the suit was placed before the Trial Court, the lawyer of the present petitioner withdrew his appearance, the Court notice was served on the petitioner and other defendants. Despite receipt of Court notice they did not bother to appear. In the decree final application (final decree) proceedings were initiated and the present petitioner appeared through his Advocate in the said proceedings on

6th December, 2001. Thus, it is inconceivable that he was unaware of the decree being passed against the tenant in the regular suit.

5. It is in these circumstances that the lower Appellate Court in para 14 of the impugned order concluded thus:

> "14. From the documents on the record, it is clearly seen that applicant was aware in the year 2001 itself, when he appeared in Final Decree proceedings, through Advocate, regarding the decree passed in R.C.S.No.314/1995; but still the present application is filed on 12.1.2007. It is also seen that when his lawyer withdrew vakalatnama, suomotu notices were issued and they were served; but neither present applicant nor his brother appeared in the court and hence, exparte decree was passed against them. Thus, there is absolute no substance in the application. The authorities cited on behalf of applicant are not at all applicable to the present facts of the case. On the contrary, I am convinced

> that present application is filed after concealing the material facts from the Court and hence, applicant does not deserve any equitable relief. Hence, I reply the point in the negative."

6. Shri Kulkarni would urge that the present petitioner is a person who is practicing Ayurvedic medicine. He goes too far off in search of Herbs and plants which have medicinal value. After inspecting them he extracts necessary ingredients for preparing medicine.He is required to go out of town on such visits frequently. It is in such circumstances that he was unaware of the decree being passed.

7. Shri Kulkarni could not dispute the fact, as noticed by the lower Appellate Court, that the Advocate was engaged by the present petitioner and he withdrew his appearance for want of instructions. Thereafter, the court notice was issued and the petitioner did not remain present. The death of the second respondent is pleaded as a cause which is much after the date of preliminary decree and even after the decree in final proceedings. In such circumstances, the

finding of the lower Appellate Court that no sufficient cause is shown and the application lacks bonafides is consistent with the material produced. The discretion exercised against the petitioner cannot be said to capricious or arbitrary so as to warrant interference under Article 227 of the Constitution of India. Considering the conduct of the present petitioner who has not been diligent through out, this is not a fit case for interference under Article 227 of the Constitution of India. Petition is summarily dismissed.

(S.C.DHARMADHIKARI J.)